

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Comcast Cable Communications, LLC)	CSR-6532-A
)	
For Modification of the Pensacola, Florida/ Mobile, Alabama DMA)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: June 3, 2005**Released: June 7, 2005**

By the Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. Comcast Cable Communications, LLC ("Comcast"), filed the above-captioned petition for special relief seeking to modify the Pensacola, Florida/Mobile, Alabama designated market area ("DMA") with respect to television broadcast station WPAN (Ch. 53), Fort Walton Beach, Florida ("WPAN"). Specifically, Comcast requests that WPAN be excluded, for purposes of the cable television mandatory broadcast signal carriage rules, from the communities of Chickasaw, Eight Mile, Mobile, Prichard, Saraland, Satsuma, and the immediately surrounding areas of unincorporated Mobile County, Alabama. An opposition to this petition was filed on behalf of Franklin Media, Inc., licensee of WPAN, to which Comcast replied. For the reasons stated below, we grant Comcast's request.

II. BACKGROUND

2. Pursuant to Section 614 of the Communications Act and implementing rules adopted by the Commission in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues ("Must Carry Order")*, commercial television broadcast stations are entitled to assert mandatory carriage rights on cable systems located within the station's market.¹ A station's market for this purpose is its "designated market area," or DMA, as defined by Nielsen Media Research.² A DMA is a geographic market designation that defines each television market exclusive of

¹8 FCC Rcd 2965, 2976-1977 (1993).

²Section 614(h)(1)(C) of the Communications Act, as amended by the Telecommunications Act of 1996, provides that a station's market shall be determined by the Commission by regulation or order using, where available, commercial publications which delineate television markets based on viewing patterns. *See* 47 U.S.C. §534(h)(1)(C). Section 76.55(e) requires that a commercial broadcast television station's market be defined by Nielsen Media Research's DMAs. 47 C.F.R. § 76.55(e); *see Definition of Markets for Purposes of the Cable Television Broadcast Signal Carriage Rules*, 14 FCC Rcd 8366 (1999) ("Modification Final Report and Order").

others, based on measured viewing patterns. Essentially, each county in the United States is allocated to a market based on which home-market stations receive a preponderance of total viewing hours in the county. For purposes of this calculation, both over-the-air and cable television viewing are included.³

3. Under the Act, however, the Commission is also directed to consider changes in market areas. Section 614(h)(1)(C) provides that the Commission may:

with respect to a particular television broadcast station, include additional communities within its television market or exclude communities from such station's television market to better effectuate the purposes of this section.⁴

In considering such requests, the 1992 Cable Act provides that:

the Commission shall afford particular attention to the value of localism by taking into account such factors as –

- (I) whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community;
- (II) whether the television station provides coverage or other local service to such community;
- (III) whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community;
- (IV) evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community.⁵

The legislative history of the provision states that:

where the presumption in favor of [DMA] carriage would result in cable subscribers losing access to local stations because they are outside the [DMA] in which a local cable system operates, the FCC may make an adjustment to include or exclude particular communities from a television station's market consistent with Congress' objective to ensure that television stations be carried in the area in which they serve and which form their economic market.

* * * *

³For a more complete description of how counties are allocated, see Nielsen Media Research's *Nielsen Station Index: Methodology Techniques and Data Interpretation*.

⁴47 U.S.C. §534(h)(1)(C).

⁵*Id.*

[This subsection] establishes certain criteria which the Commission shall consider in acting on requests to modify the geographic area in which stations have signal carriage rights. These factors are not intended to be exclusive, but may be used to demonstrate that a community is part of a particular station's market.⁶

In adopting rules to implement this provision, the Commission indicated that requested changes should be considered on a community-by-community basis rather than on a county-by-county basis, and that they should be treated as specific to particular stations rather than applicable in common to all stations in the market.⁷

4. In the *Modification Final Report and Order*, the Commission, in an effort to promote administrative efficiency, adopted a standardized evidence approach for modification petitions that requires the following evidence be submitted:

(1) A map or maps illustrating the relevant community locations and geographic features, station transmitter sites, cable system headend locations, terrain features that would affect station reception, mileage between the community and the television station transmitter site, transportation routes and any other evidence contributing to the scope of the market.

(2) Grade B contour maps delineating the station's technical service area and showing the location of the cable system headends and communities in relation to the service areas.

Note to Paragraph (b)(2): Service area maps using Longley-Rice (version 1.2.2) propagation curves may also be included to support a technical service exhibit.⁸

(3) Available data on shopping and labor patterns in the local market.

(4) Television station programming information derived from station logs or the local edition of the television guide.

(5) Cable system channel line-up cards or other exhibits establishing historic carriage, such as television guide listings.

(6) Published audience data for the relevant station showing its average all day audience (i.e., the reported audience averaged over

⁶H.R. Rep. 102-628, 102d Cong., 2d Sess. 97 (1992).

⁷*Must Carry Order*, 8 FCC Rcd 2965, 2977 n.139.

⁸The Longley-Rice model provides a more accurate representation of a station's technical coverage area because it takes into account such factors as mountains and valleys that are not specifically reflected in a traditional Grade B contour analysis. In situations involving mountainous terrain or other unusual geographical features, Longley-Rice propagation studies can aid in determining whether or not a television station actually provides local service to a community under factor two of the market modification test.

Sunday-Saturday, 7 a.m.-1 a.m., or an equivalent time period) for both cable and noncable households or other specific audience indicia, such as station advertising and sales data or viewer contribution records.⁹

Petitions for special relief to modify television markets that do not include the above evidence shall be dismissed without prejudice and may be re-filed at a later date with the appropriate filing fee. The *Modification Final Report and Order* provides that parties may continue to submit whatever additional evidence they deem appropriate and relevant.

III. DISCUSSION

5. The issue before us is whether to grant Comcast's request to exclude WPAN from mandatory carriage in the subject communities. All of the communities at issue are located in the Pensacola/Mobile DMA, as is WPAN, which is licensed to Fort Walton Beach, Florida. Considering all of the relevant factual circumstances in the record, we believe that the market modification petition is a legitimate request to redraw DMA boundaries to make them congruous with market realities.

6. The first statutory factor we must consider is "whether the station, or other stations located in the same area, have been historically carried on the cable system or systems within such community."¹⁰ Comcast states that WPAN has never been carried in the cable communities, despite being on-the-air for more than 20 years.¹¹ Comcast states that this is compelling evidence of a lack of nexus between WPAN and the communities. Comcast argues further that, because WPAN has never been carried, there would be no disruption of established viewing patterns and WPAN would not be deprived of an existing audience.

7. Second, we consider "whether the television station provides coverage or other local service to such community."¹² Comcast argues that a Longley-Rice propagation study demonstrates that all of the communities are located beyond WPAN's Grade B contour.¹³ Moreover, signal strength studies taken at the cable system's principal headend demonstrate that WPAN does not provide an off-air signal of adequate strength.¹⁴ Comcast argues that WPAN's lack of signal coverage is not surprising when the average distance between Fort Walton Beach, WPAN's city of license, and the cable communities is approximately 92 miles.¹⁵ Comcast states that such a distance exceeds those found to justify the grant of previous market modification requests to exclude a station.¹⁶ Comcast maintains that the lack of nexus is

⁹47 C.F.R. §76.59(b).

¹⁰47 U.S.C. §534(h)(1)(C).

¹¹Modification at 3 and Exhibit 5.

¹²47 U.S.C. §534(h)(1)(C).

¹³Modification at Exhibit 3.

¹⁴*Id.* at Exhibit 6. Comcast argues that, because of this, it is unlikely that WPAN provides a quality off-air signal to individual households in the subject communities.

¹⁵*Id.* at Exhibit 1. Comcast states that actual distances range from 89 miles to 93 miles.

¹⁶*Id.* at 5, citing *Greater Worcester Cablevision, Inc.*, 13 FCC Rcd 22220 (1998) (39-70 miles); *Greater Worcester Cablevision, Inc.*, 12 FCC Rcd 17347 (1997) (38-61 miles); *Time Warner Cable*, 12 FCC Rcd 23249 (1997) (42-58 miles); *Time Warner Cable*, 11 FCC Rcd 13149 (1996) (45 miles); *Cablevision of Cleveland, L.P. and V Cable, Inc. d/b/a Cablevision of Ohio*, 11 FCC Rcd 18034 (1996) (41 miles).

also demonstrated by the driving distance of approximately 117 miles between Fort Walton Beach and the communities.¹⁷ Comcast asserts that WPAN's situation is consistent with the "hub and spoke" model described by the U.S. Court of Appeals for the Second Circuit, with WPAN a "spoke" with regard to the central "hub" of Mobile, Alabama.¹⁸ As such, Comcast states, residents in the subject communities do not look to Fort Walton Beach for programming. Finally, Comcast states that WPAN does not appear to provide any local programming to the communities at issue.¹⁹ Moreover, both the local edition of *TV Guide* and the local newspaper, *The Mobile Register*, fail to list WPAN.²⁰

8. The third statutory factor we must consider is "whether any other television station that is eligible to be carried by a cable system in such community in fulfillment of the requirements of this section provides news coverage of issues of concern to such community or provides carriage or coverage of sporting and other events of interest to the community."²¹ Comcast states that the cable systems serving the subject communities currently carry several stations licensed to Mobile County, all of which provide Grade A contour coverage, actual off-air signals, and extensive coverage of local news and sporting events.²² Comcast argues that even if WPAN were to provide programming targeted specifically to the communities, the coverage provided by the truly local stations would undermine any special benefits associated with WPAN.

9. The fourth statutory factor concerns "evidence of viewing patterns in cable and noncable households within the areas served by the cable system or systems in such community."²³ Comcast states that, because WPAN is unable to deliver an off-air signal or a Grade B signal to the communities, it is not surprising that WPAN has no significant viewership. Comcast points out that a viewership study it commissioned was unable to find any ratings for WPAN in either cable or noncable households in Mobile County where the subject communities are located.²⁴

10. In its opposition, WPAN points out that in *Franklin Media, Inc. v. Comcast Cable Communications*, Comcast was ordered by the Commission to carry WPAN on its cable system serving Mobile, Alabama.²⁵ WPAN argues that, to the extent that the instant petition might be viewed as seeking reconsideration of that order, it is untimely. In any event, WPAN states that although Comcast has not appealed the must carry decision, Comcast has refused WPAN access to install a fiber optic link that would permit delivery of a good quality signal to the Mobile headend.²⁶ WPAN argues that Comcast's contention that WPAN has not been carried because of distance and lack of a good quality signal were previously raised and addressed in WPAN's must carry complaint.²⁷ WPAN asserts that the main reason

¹⁷*Id.* at Exhibit 9.

¹⁸*Id.* at 5-6.

¹⁹*Id.* at Exhibit 10.

²⁰*Id.* at 6.

²¹47 U.S.C. §534(h)(1)(C).

²²Modification at Exhibit 4.

²³47 U.S.C. §534(h)(1)(C).

²⁴Modification at Exhibit 13.

²⁵Opposition at 2, citing 19 FCC Rcd 24086 (2004).

²⁶*Id.* at 2.

²⁷*Id.*

for its lack of historic carriage is Comcast's own refusal to comply with a legitimate Commission order. Moreover, WPAN states that, despite Comcast's argument concerning a lack of nexus, the Mobile stations are carried in the Fort Walton Beach area and deliver the signals via fiber optics.²⁸ WPAN states that it is presently carried by DIRECTV and will be carried on DISH network, both of which serve the Pensacola DMA.²⁹ As a result, WPAN maintains that it is likely that it does share viewership in the Mobile area. Indeed, WPAN states that another cable operator, Mediacom, has agreed to carry WPAN on its Mobile system and WPAN has advertisers in Mobile.³⁰ WPAN concludes that Comcast's petition should be denied and that it cannot be permitted to continue its disregard of the prior Commission order on the basis of a market modification request.

11. In reply, Comcast states that WPAN effectively ignores the substantive issues raised in the instant petition and instead relies almost exclusively on a procedural point as a basis to deny the petition. Comcast argues that WPAN's claim that Comcast's market modification request is an untimely and defective appeal of the Media Bureau's grant of WPAN's must carry complaint is entirely without merit.³¹ Comcast argues that, despite WPAN's contentions, a cable operator is permitted under the Commission's rules to file a petition for market modification at any time.³² Moreover, WPAN's claim that Comcast ignored the *Order* and improperly refused to allow WPAN to provide its signal via fiber optic link is equally specious.³³ Comcast asserts that it is well established that the status quo regarding carriage be maintained during the pendency of a market modification petition.³⁴ Further, Comcast asserts that the previous must carry order does not address any of the substantive issues raised herein relevant to market modification.³⁵ In that order, states Comcast, the only issue was WPAN's ability to deliver a good quality signal to the cable system's principal headend.

12. Aside from its procedural argument, Comcast states that WPAN fails to rebut any of the issues raised in the market modification petition.³⁶ Specifically, Comcast states that WPAN does not dispute that it has not been carried for over 20 years, has no Grade B contour coverage, and provides no local programming to the communities.³⁷ While WPAN does contend that it can deliver a good quality signal to Comcast's headend via fiber optic link, Comcast argues that WPAN is confusing the elements of a must carry proceeding with those relevant to market modification.³⁸ Comcast points out that although a

²⁸*Id.*

²⁹*Id.*

³⁰*Id.*

³¹Reply at 2.

³²*Id.*, citing 47 C.F.R. §§ 76.7, 76.59.

³³*Id.*

³⁴*Id.*, citing *Brownwood Cable Television Service, Inc.*, 16 FCC Rcd 3108 (2001); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, 8 FCC Rcd 2965, 2977 (1993) ("During the pendency of a [market modification] petition before the Commission, cable operators will be required to maintain the status quo with regard to signal carriage."); *Petition of Time Warner New York City Cable Group*, 11 FCC Rcd 6514 (1996).

³⁵*Id.* at 3.

³⁶*Id.*

³⁷*Id.* at 3-4.

³⁸*Id.* at 4.

signal delivery commitment by a station may meet the Commission's "good quality signal" requirement for must carry eligibility purposes, it is not a test that is relevant in a market modification proceeding.³⁹ Further, Comcast argues that WPAN does not explain how the existence of a few advertisers in Mobile demonstrates a local nexus between the station and the subject communities or why it deserves credit under the viewership factors because of carriage by satellite providers.⁴⁰ Comcast asserts that the viewership surveys it provided clearly show no viewership for WPAN is either cable or noncable homes; the only relevant studies in market modification proceedings.⁴¹ Finally, Comcast states that WPAN's contention that Fort Walton Beach residents receive Mobile stations only reinforces the "hub and spoke" scenario.⁴²

13. With regard to its procedural argument, we note that WPAN is in error in its contention that Comcast's market modification petition can in any way be construed as a petition for reconsideration of the Commission's decision in *Franklin Media* which granted WPAN's must carry complaint. Comcast was well within its rights to file a petition for market modification and the pendency of such a petition would stay the effectiveness of any previous order relating to carriage. In any event, we note that the Bureau's December 14, 2004 decision in *Franklin Media* was a conditional grant of carriage that would only be effective 60 days after WPAN's proven ability to deliver a good quality signal to the cable system's principal headend. Comcast's petition for market modification was filed on January 24, 2005, well before the possible effective date of the must carry order and stayed any obligation to carry WPAN.⁴³

14. Section 614(h)(1)(C) of the Communications Act authorizes the Commission to include or exclude particular communities from a television station's market for the purpose of ensuring that a television station is carried in the areas which it serves and which form its economic market.⁴⁴ Section 614(h)(1)(C)(i) specifically and unambiguously directs the Commission, in considering requests for market modification, to afford particular attention to the value of localism by taking four statutory factors into account.⁴⁵ In this matter, WPAN has no history of carriage despite being on-the-air for 20 years and no discernable viewership in the communities at issue. In addition, WPAN has failed to show that it provides any local programming to the communities at issue. It is also clear that WPAN is geographically distant from the majority of communities at an average 92 miles distant; and that it fails to provide a Grade B signal according to Longley-Rice. For the subject communities, therefore, the factors weigh in favor of granting Comcast's request.

IV. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED**, pursuant to Section 614(h) of the Communications Act

³⁹*Id.*, citing 47 C.F.R. § 76.55(c).

⁴⁰*Id.* at 5.

⁴¹*Id.*

⁴²*Id.* at 5-6.

⁴³*See* 47 C.F.R. § 76.59(d).

⁴⁴47 U.S.C. § 534(h)(1)(c).

⁴⁵47 U.S.C. § 534(h)(1)(C)(i).

of 1934, as amended, 47 U.S.C. §534, and Section 76.59 of the Commission's rules, 47 C.F.R. §76.59, that the captioned petition for special relief (CSR-6532-A), filed by Comcast Cable Communications LLC **IS GRANTED.**

16. **IT IS FURTHER ORDERED**, that the Commission decision in CSR-6380-M (released December 16, 2004) **IS HEREBY RESCINDED.**

17. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules.⁴⁶

FEDERAL COMMUNICATIONS COMMISSION

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⁴⁶47 C.F.R. §0.283.